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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District.

BRIEF OF AMICUS CURIAE THE COUNTY OF LOS ANGELES ON BEHALF OF RESPONDENT.

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BRIEF OF AMICUS CURIAE THE COUNTY OF LOS ANGELES ON BEHALF OF RESPONDENT.

Interest of Amicus Curiae.

This brief is submitted pursuant to Rule 36.4 of the Revised Rules of the Supreme Court of the United States by the County of Los Angeles, a political subdivision of the State of California and is sponsored by the County Counsel of the County of Los Angeles as the authorized law officer thereof.

The brief is submitted at the direction of the Board of Supervisors of Los Angeles County, the governing body of said County, on motion of Supervisor Michael D. Antonovich, seconded by Supervisor Deane Dana. The remaining members of the Board of Supervisors, Peter Schabarum, Chairman, Edmund D. Edelman and Kenneth Hahn joined in the action authorizing the brief.

This brief is submitted in support of the constitutionality of Article 1, Section 7 of the California Constitution as amended November 6, 1979 (hereinafter referred to as Proposition 1). In so doing, the County is supporting the electors of the County of Los Angeles who voted overwhelmingly to enact Proposition 1.[1]

In the view of the County of Los Angeles, the most important question to be decided by the Court in this case is whether a state may enact requirements for school integration that exceed the mandates of the federal law in some particulars and which mirror the federal requirements in others. The California Constitution as amended by Proposition 1 imposes requirements beyond the federal mandates upon school districts experiencing *de facto* segregation, but stops short of state mandated, disruptive pupil reassignments in those districts. The County believes that Proposition 1 was intended to, and in fact will, serve the best interests of the children of the State and of the County of Los Angeles.

Thus, we urge in this brief that the Court uphold the constitutionality of Proposition 1. In so doing, the Court would be announcing that so long as there is compliance with the requirements of federal law, states are free to require additional steps to integrate schools and still retain the power to limit their efforts to federally mandated levels when they deem that to be desirable. We not only urge that Proposition 1 is constitutional, but maintain that it creates a favorable atmosphere in which to encourage school integration. A fear that any action taken, which exceeds that required by federal law, is irreversible, cannot further the cause of integration.

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[1]The County-wide vote in favor of Proposition 1 was 775,838 to 273,511, or 73.94% in favor and 26.06% opposed. Official Election Returns for the Special State-wide Election, Los Angeles County, November 6, 1979, compiled by Leonard Panish, Registrar-Recorder.

Summary of Argument.

Proposition 1 does not establish a two-tiered California equal protection clause that affords more protection to one class of persons than to other classes. Article I, Section 7 of the California Constitution has been extended beyond the requirements of the United States Constitution in some instances, and not in others. However, California has not done this in a manner which in any way establishes a pattern of granting benefits to one class of persons while denying benefits to an equivalent class.

The motives of the voters in enacting Proposition 1 are of no relevance in assessing the constitutionality of this law since Proposition 1 does not have a discriminatory effect. It is only when a law has a discriminatory or disparate effect that the courts will then inquire into whether the law was enacted with the invidious intent of causing that discriminatory or disparate effect. Where a law does not have the effect of imposing burdens or denying benefits on an unequal basis, the motives of the persons enacting the law are not relevant to the validity of such a law.

Even if motive were a relevant subject of inquiry in this case, petitioners have not and cannot establish the dominant motive, if indeed one exists, for the millions of votes in support of Proposition 1. A showing of a desire to end the mandatory reassignment and transportation of students to schools far from their homes, absent a showing that such assignments are necessary to remedy a violation of the United States Constitution, is not a showing of discriminatory intent. It would be more appropriate to presume that there was no discriminatory intent behind the vote, since Proposition 1 passed by large margins in both minority and non-minority communities. The California Court of Appeal has already found no invidious motive behind the enactment

of Proposition 1, and that finding is entitled to considerable deference.

Proposition 1 merely amends the California Constitution to conform to the United States Constitution in some respects. It does not repeal any law. However, even if the petitioners were correct in their argument that Proposition 1 is equivalent to the repeal of an existing law, this would be of no significance in determining its validity. The mere repeal of a law not mandated by the United States Constitution cannot be a violation of the United States Constitution. Cases cited by the petitioners and their supporting *amici curiae* as authority to the contrary do not stand for the proposition for which they are cited.

ARGUMENT.

1. Article I, Section 7, of the California Constitution as Amended by Proposition 1 Does Not Embody an Impermissible Racial Classification.

Petitioners and the *amici curiae* supporting their position argue that the people of the State of California have created a dual court system — a first-class judicial system for non-minorities and for problems unrelated to race, and second-class judicial system with less available relief for minorities (See pages 30 and 31, Petitioners' Brief).

Petitioners' equal protection argument assumes that California has consistently granted equal protection and due process relief under Article I, Section 7 in excess of that available pursuant to the United States Constitution. California's refusal to extend relief pursuant to the California Constitution in the form of pupil reassignment to alleviate segregation where such relief is not required by federal constitutional law is understood by petitioners as a single, race-related exception to the general rule that state constitutional relief is available under Article I, Section 7 exceeding that available under corresponding federal provisions.

Petitioners' assumption and argument are incorrect. A review of California law regarding Article I, Section 7, including the provisions of Proposition 1, indicates that relief in excess of that required by the United States Constitution has been granted in some instances and in some instances has been refused. Instances in which extra relief is granted and in which it has been denied show no pattern of racial discrimination.

On page 47 of Petitioners' Brief, five cases are listed in footnote 26 as examples of instances in which the California Supreme Court has relied upon Article I, Section 7 of the

California Constitution to grant relief unavailable pursuant to corresponding federal constitutional law.[2] In an even greater number of cases, the California Supreme Court has declined to interpret Article I, Section 7 to provide relief not called for under federal constitutional provisions.[3]

For example in *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 585 P.2d 219, a criminal defendant sought relief from prosecution for an offense which would have

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[2]*Serrano v. Priest* (1976) 18 Cal.3d 728, 557 P.2d 929, *Serrano v. Priest* (1971) 5 Cal.3d 584, 487 P.2d 1241 (striking down a system of public school financing); *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529 (invalidating a statute prohibiting women from tending bar); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 625 P.2d 779 (enjoining enforcement of provisions restricting use of public funds to pay for abortions for indigent mothers); *People v. Ramirez* (1979) 25 Cal.3d 260, 599 P.2d 622 (listing due process requirements for exclusion of a patient inmate from a state drug rehabilitation center).

[3]*Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 546 P.2d 687 (invalidation of rule of state labor relations board permitting access to agricultural property by farm labor organization on federal and state due process grounds denied); *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 553 P.2d 624 (writ to compel destruction of arrest record denied); *Miller v. State of California* (1977) 18 Cal.3d 808, 557 P.2d 970 (compulsory retirement not invalidated as violative of California and federal due process clauses); *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 562 P.2d 1315 (refusal of relief based on equal protection claims regarding discriminatory police enforcement practices against female prostitutes; *Toward Utility Rate Normalization v. Public Utilities Commission* (1978) 22 Cal.3d 529, 585 P.2d 491 (court refused to overturn decision of Public Utilities Commission on equal protection grounds); *Price v. Civil Service Commission* (1980) 26 Cal.3d 257, 604 P.2d 1365 (under applicable facts race conscious affirmative action plan not violative of federal and state equal protection clauses); *Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 616 P.2d 1287 (damages for invasion of constitutional due process rights denied where cessation of water services used to enforce collection of unified municipal services bill not paid in full); *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 620 P.2d 612 (writ based upon equal protection grounds to require certain candidates to be designated by their party rather than as "Independent" denied); *DeRonde v. Regents of California* (1981) 28 Cal.3d 875, 625 P.2d 220 (state equal protection clause does not bar University admission procedures which permit consideration of ethnic minority status).

been barred by the applicable statute of limitations except for provisions tolling the statute of limitations for periods of time during which the defendant was out of state. The Court refused to grant relief under the equal protection clauses of either the federal or state constitutions.

In *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 578 P.2d 925, the court stated:

> "Although in interpreting the scope of the due process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments (See *Kruger, supra*, 11 Cal.3d 352, 367, fn. 21), we have found no reason to depart from those cases in the present context. We therefore conclude for the reasons set forth above in relation to petitioners' federal Constitution claim that the nonjudicial foreclosure of a deed of trust constitutes private action authorized by contract and does not come within the scope of the California due process clause."

The restriction on relief available pursuant to Article I, Section 7, contained in Proposition 1 is one more such instance where California law does not utilize the equal protection and due process clauses of its Constitution to provide relief beyond that available under federal law. In order to determine whether the present form of Article I, Section 7 of the California Constitution contains racial classifications or has been applied in an invidiously discriminatory manner, it is necessary to compare the instances in which it has been the source of extra relief and the instances where no relief beyond that available under federal constitutional law has been required.

An examination of California law relating to Article I, Section 7 of the California Constitution[4] thus reveals that relief in addition to that provided by the United States Constitution has been made available in circumstances involving school finance (*Serrano v. Priest*), women bartenders (*Sail'er Inn, Inc. v. Kirby*), publicly funded abortions (*Committee to Defend Reproductive Rights v. Myers*), due process prior to exclusion from state drug rehabilitation center (*People v. Ramirez*). On the other hand, relief in excess of that provided by the United States Constitution has been withheld in instances involving state labor board regulations (*Agricultural Labor Relations Board v. Superior Court*), arrest records (*Loder v. Municipal Court*), compulsory retirement (*Miller v. State of California*), criminal law (*People v. Superior Court* (*Hartway*)), public utilities regulations (*Toward Utility Rate Normalization v. Public Utilities Commission*), affirmative employment action (*Price v. Civil Service Commission*), city collection practices (*Perez v. City of San Bruno*), elections (*Libertarian Party v. Eu*), affirmative action in University admissions (*DeRonde v. Regents of California*), nonjudicial foreclosure of deeds of trust (*Garfinkle v. Superior Court*), and pupil reassignment pursuant to the provisions of Proposition 1.

Scrutiny of the instances listed above in which Article I, Section 7 extra relief is available or unavailable produces no racial classification. No racial classification is to be found in the instances in which extra relief has been granted. No racial classification is to be found in the instances in which extra relief has been denied. To the extent California grants

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[4]Citations to cases referenced in the first sentence of this paragraph are found in footnote 2. The remainder of the cases are cited in footnote 3 except *Garfinkle v. Superior Court, supra* (1978) 21 Cal.3d 268, 578 P.2d 925.

or withholds relief beyond that available under the federal equal protection and due process clauses, it does so without regard to race.

2. The Motives of Those Persons Voting to Enact Proposition 1 Are Not Relevant to the Constitutionality of Proposition 1.

Petitioners and their supporting *amici curiae* have devoted substantial portions of their briefs in support of the argument that Proposition 1 is unconstitutional because invidious motives were allegedly behind its enactment. However, these briefs devote little discussion to whether this is a proper case for inquiry into the motives giving rise to the enactment of the law in question.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, cited by petitioners, this Court reviewed with approval the California Supreme Court's inquiry into the "immediate objective," "ultimate effect," and the "historical context and the conditions existing prior to its enactment" of a State Constitutional provision specifically allowing private housing discrimination. In issue in the case was whether clearly discriminatory private conduct became state action proscribed by the Fourteenth Amendment because of the nature of the enactment and the circumstances surrounding its adoption. This is far different from the matter herein where there clearly is state action, but certainly no discriminatory effect since the enactment in question requires compliance with the Fourteenth Amendment.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555, and in *Washington v. Davis* (1976) 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040, this Court did hold that an inquiry into motives is necessary where there is a showing of a disparate impact of governmental action in

order to determine whether such disparate impact was the result of invidious intent. In *Village of Arlington Heights*, a builder was denied the zoning changes necessary to allow the building of a large integrated housing project for low- and moderate-income families in an almost exclusively non-minority area. This Court recognized that this showing of disparate impact on low-income and minority persons was not enough in and of itself to constitute a violation of the Fourteenth Amendment. A showing that such an impact was the result of invidious intent on the part of the state was also considered necessary.

In *Washington v. Davis*, a governmental body's preemployment test which excluded a disproportionate number of Blacks was attacked as violating the Fourteenth Amendment. This Court held that this disparate impact in and of itself was not sufficient to show a constitutional violation. A showing of invidious intent was also necessary.

On the other hand, where governmental action has no particular disparate impact which burdens or benefits members of one race or ethnic group over others, the courts have consistently held that the motive behind the governmental action is not relevant to the validity of the action. Thus, in *United States v. O'Brien* (1968) 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, the Court refused to overturn the conviction of a person convicted of burning his draft card, rejecting the argument that the law proscribing the destruction of a draft registration certificate was enacted with the intent of inhibiting the freedom of speech. The Court at 391 U.S. at 383, 20 L.Ed.2d at 683, stated:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

> " 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be executed.' *McCray v. United States* (1904) 195 U.S. 27, 56; 49 L.Ed. 78, 95; 24 S.Ct. 769."

This rule has even been applied in cases where an otherwise neutral governmental action was alleged to have been motivated by an intent to avoid integration. In *Palmer v. Thompson* (1971) 403 U.S. 217, 29 L.Ed.2d 438, 91 S.Ct. 1940, the Court reviewed the closing of all municipal swimming pools by a city shortly after that city was ordered to integrate its public facilities, including the swimming pools. The Court rejected the argument that the action was invalid because the motive of the city was to avoid integrating the pools. The Court at 403 U.S. at 224-225, 29 L.Ed.2d at 444-445 stated:

> "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. . . .
>
> "It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."

Proposition 1 merely provides that with regard to pupil reassignments mandated by a court of law, the California rule will be equivalent to the Federal rule. It is difficult to imagine how a law that requires compliance with the United States Constitution can have a discriminatory or disparate

impact. Proposition 1 applies to all persons in California. It does not exclude any group from the public schools, nor does it provide any group with a better public education than any other group.

Petitioners' claim with regard to the motivations behind the passage of Proposition 1 is no more meritorious than the claim of the plaintiff in *Palmer v. Thompson, supra.* Because the law has no disparate or discriminatory impact, the motivations of those voting to enact Proposition 1 are not relevant to its validity.

3. Even if Intent Were Relevant in Determining the Validity of Proposition 1, Petitioners Have Not Shown and Cannot Show That the Adoption of Proposition 1 Was an Act Motivated by Invidious Discriminatory Intent.

Even though we have asserted the position that the intent behind the enactment of Proposition 1 is not relevant in determining its validity, the assertion of petitioners that they have shown a discriminatory motive should not go unchallenged. Nothing presented by petitioners or their supporting *amici curiae* establishes an invidious motive on the part of the voters.

The statements of petitioners as to the motives of those voting for Proposition 1 are nothing more than speculation. Indeed, any conclusion as to the motivations behind the millions of votes for Proposition 1 would necessarily be the result of pure speculation.

Proposition 1, itself, declares that its purpose is:

> ". . . to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of

> all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

How is it possible for anyone to say that one or more of the above reasons were not the only or at least the primary motivation behind the votes of those persons voting for Proposition 1?

Petitioners and their supporting *amici curiae* cite newspaper articles and ballot arguments in support of their assertion of a general opposition among the citizens of California to forced reassignment of students, and argue that Proposition 1 was perceived as and supported because it was a vehicle for ending mandatory pupil reassignments in some California school districts, including Los Angeles. However, such a showing does not begin to show discriminatory or segregative intent.

To be against the mandatory reassignment of students to schools some distance from home, when not compelled by federal law, does not necessarily imply opposition to racial integration. The voters of California could have been voicing their opposition to the unnecessary placement of young children on school buses to travel far from home to attend school each day. They could have been voicing their opposition to children unnecessarily spending large amounts of time on school buses when the time could be better spent on homework or recreation. They could have been voting to support integration by opposing the very unpopular integration plan in existence in Los Angeles which physically integrated few schools and which drove thousands of nonminority students from the school system, thus making more meaningful integration of schools, as neighborhood integration advances, more difficult.

Any one of these, or any number of other reasons, could have been the motivation or those persons voting for Proposition 1. Opposition to racial integration may have been a factor behind the votes of some voters. However, it is pure speculation to conclude that such a motive was the predominant motive or even a significant one.

Indeed, the facts suggest just the opposite. Proposition 1 received overwhelming statewide support. It was supported by non-minority and minority communities alike. For example, Proposition 1 won a majority of the votes in all but one of the seventeen Congressional districts in Los Angeles County, all but one of the sixteen State Senate districts, and all but one of the thirty State Assembly districts. It carried in all five Supervisoral districts in the County. Of the seventy-nine cities located within the County, it carried in all but two (and in one of these two it lost by only one vote). Of the one hundred public school districts located within the County, it carried in all but one.

The districts in which Proposition 1 passed include predominantly minority districts, which at the time were represented by minority group representatives. In the four Congressional districts within the County represented by minority group Congressmen, Proposition 1 passed by over 56% of the vote. In the five State Senate districts in the County represented by minority group Senators, Proposition 1 passed by almost 61% of the vote. In the seven State Assembly districts within the County represented by minority group Assemblymen, Proposition 1 passed by over 59% of the vote.[5]

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[5]Official Election Returns for the Special Statewide Election, Los Angeles County, November 6, 1979, compiled by Leonard Panish, Registrar-Recorder.

In making its inquiry into the intent behind the enactment of the constitutional provision under consideration in *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, the Court recognized that the California Supreme Court had reviewed the issue and indicated that the California Court's determination on this question was entitled to substantial deference because that Court was "armed with the knowledge of the facts and circumstances concerning the passage and potential impact of Proposition 14, and familiar with the milieu in which that proposition would operate." (*Id.*, 387 U.S. at 378, 18 L.Ed.2d at 836.) Similarly in this case, the California Court of Appeal "armed with the knowledge of the facts" found no discriminatory purpose or intent in the enactment of Proposition 1. *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633, 645-655, 179 Cal.Rptr. 495. This finding is further evidence of the invalidity of the argument of petitioners regarding motive and intent.

Consequently, it is submitted that even if intent or motive were a relevant issue in this matter, the Court would be compelled to conclude that there was no invidious intent which motivated the passage of Proposition 1.

4. Amending a Law to Embrace the United States Constitution Cannot Be a Violation of the United States Constitution.

Proposition 1 did nothing more than interpret the California Constitution to embrace the requirements of the United States Constitution on the issue of court-ordered pupil assignments for school integration purposes. Proposition 1 goes no further. It does not prohibit the State Legislature from enacting legislation that goes beyond the Federal Constitution. It does not make the enactment of a law dealing with school integration any more difficult than the

enactment of a law on any other subject. It does not even reach the level of a repeal of an existing law as petitioners and their supporting *amici curiae* argue. However, even if Proposition 1 did somehow constitute the repeal of any existing law, this would be of no legal consequence.

The mere repeal of a state law not required by the United States Constitution cannot be a violation of the United States Constitution. *Reitman v. Mulkey* (1967) 387 U.S. 369, 376, 18 L.Ed.2d 830, 835, 87 S.Ct. 1627; *Hunter v. Erickson* (1969) 393 U.S. 385, 390, note 5, 21 L.Ed.2d 616, 621, 89 S.Ct. 557. In *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 414, 53 L.Ed.2d 851, 859, 97 S.Ct. 2766, the Court in reviewing a school board rescission of a previously existing integration program, quoted with approval the opinion of the Court of Appeals in the same case as follows:

> " 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. . . . If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation.' "

Similarly in this case, the citizens of California have chosen to modify a law to embrace the provisions of the United States Constitution. To the extent this law previously required something more than is required by the United States Constitution, that "something more," by definition, could not be required by the United States Constitution. Consequently, a modification to remove a portion of that "something more" cannot be a violation of the United States Constitution.

The petitioners and their supporting *amici curiae* have cited cases in support of the proposition that the mere repeal of a state law can constitute a violation of the United States Constitution. All of the cited cases, however, are clearly distinguishable from this case.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, the Court was concerned with another California Constitutional amendment that repealed a State fair housing law, and also prohibited the enactment of any other fair housing laws in the State. It was not the repeal of the existing law that the Court found to offend the Constitution, however. The Court found that in enacting a State Constitutional provision specifically granting to citizens the right to sell their property to whomever they pleased, the State had specifically authorized private housing discrimination. This authorization, the Court found, had the effect of converting what is normally considered private discrimination, not controlled by the Constitution, into State discriminatory action, specifically prohibited by the Fourteenth Amendment to the United States Constitution. This situation is in no way analogous to the facts in the instant case, and the holding of *Reitman v. Mulkey* has no application to this case.

Petitioners also rely upon *Hunter v. Erickson* (1969) 393 U.S. 385, 21 L.Ed.2d 616, 89 S.Ct. 557. In that case a city amended its charter to provide that any city ordinance that regulated real property transactions on the basis of race, color, religion, national origin or ancestry would have to be approved by a majority vote of the city electors at a general election before becoming effective. Such voter approval was not needed for city ordinances dealing with other issues.

This provision in the city charter had the effect of repealing a previously existing fair housing ordinance. How-

ever, it was not merely this repeal that the Court found to be in violation of the Constitution. What the Court held was that the charter provision by treating racial housing matters differently from other housing matters was a racial classification on its face, which violated the Fourteenth Amendment.

Hunter v. Erickson is, therefore, very different from the facts in this case. Proposition 1 does not make the enactment of legislation dealing with school integration more difficult to enact. It does not make any racial classifications. It merely conforms the California Constitution to the United States Constitution in one area. A law which by its very terms embraces the United States Constitution is hardly analogous to the racial classification under review in *Hunter v. Erickson*.

A declaration that Proposition 1 is unconstitutional on the basis of the rationale in *Hunter v. Erickson* would require a significant extension of the holding in *Hunter v. Erickson*. In the past, the Court has rejected even a modest extension of the holding in this case. See *James v. Valtierra* (1971) 402 U.S. 137, 141, 28 L.Ed.2d 678, 682, 91 S.Ct. 1331.

The "Brief of Amici Curiae Margaret Tinsley Et Al In Support of Petitioners" cites a number of cases in support of the assertion that "the Fourteenth Amendment may be violated by a state law repealing prior laws." (Brief pp. 35-36) However, none of the cited cases support this assertion. All of the cited cases were grounded on state action other than the mere repeal of a state enactment.

In *Griffin v. School Board of Prince Edward County* (1964) 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226, a school district after being ordered by the Supreme Court to integrate its schools (*Davis v. County School Board of Prince Edward County* (1954) 347 U.S. 483, 98 L.Ed. 873,

74 S.Ct. 686), closed all the public schools and contributed to the support of the segregated private schools that replaced them on the former public school sites. The Court in finding this action unconstitutional was hardly basing its decision merely on the action repealing the law establishing a public school system. It was the entire scheme, obviously designed to circumvent the Court's prior order, that was constitutionally offensive.

Hall v. St. Helena Parish School Board (E.D. La. 1961) 197 F.Supp. 649, affirmed per curiam (1962) 368 U.S. 515, 7 L.Ed.2d 521, 82 S.Ct. 529, also cited by the Tinsley *amici curiae* had almost identical facts to those in *Griffin*.

In *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125, the Court struck down a law which changed the boundaries of a city to exclude almost all city residents who were Black, but which did not exclude one White city resident. This case obviously did not at all deal with the mere repeal of a law and was declared invalid, not as a violation of the Fourteenth Amendment, but as a denial of the right to vote under the Fifteenth Amendment.

Rice v. Elmore (4th Cir. 1947) 165 F.2d 387, cert. denied 333 U.S. 875, 92 L.Ed. 1151, 68 S.Ct. 905, was one of the White primary cases. It involved a state which, after being ordered to allow Black persons to vote in the primary, repealed all of its primary laws and left it up to the Democratic Party to determine who could vote. The Democratic Party rules did not grant the right to vote to Black persons. The Court found that since the primary in the overwhelmingly Democratic state was the only real election contest, the conducting of the election was the exercise of state action and the exclusion of persons on the basis of race violated the Constitution. The Court could hardly be said to have based its decision on the mere repeal of state laws concerning the holding of primary elections.

United States v. Board of School Commissioners of the City of Indianapolis (7th Cir. 1978) 573 F.2d 400, cert. denied *sub nom. Bowen v. U.S.*, 439 U.S. 824, 58 L.Ed.2d 116, 99 S.Ct. 93, was a school integration case reviewing the possible imposition of an interdistrict pupil reassignment remedy. The Court in this case considered a repeal of a law along with the enactment of another law and found these legislative actions coupled with other considerations to be factors showing interdistrict actions that could possibly support the imposition of an interdistrict remedy. Whatever precedential value this case has, it certainly does not stand for the proposition that the mere repeal of a law standing alone can be a violation of the Constitution.

Finally, in *Lee v. Nyquist* (W.D., N.Y. 1970) 318 F.Supp. 710, affirmed per curiam 402 U.S. 935, 29 L.Ed.2d 105, 91 S.Ct. 1618, also cited by *amici curiae* Tinsley, et al., the Court was not concerned with the repeal of a law at all, but the enactment of law that prohibited unelected school boards from voluntarily adopting integration plans that involved pupil reassignments even in instances where the existing segregation had been intentionally caused.

Consequently, it is clear that neither petitioners nor their supporting *amici curiae* have been able to cite any authority for the novel proposition that the mere repeal of a state law not mandated by the United States Constitution can be a violation of the United States Constitution. Indeed, there is no authority for such a proposition.

It has long been recognized that a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction has not been surrendered or restrained by the United States Constitution. *New York v. Miln* (1837) 11 Peters 102, 139, 9 L.Ed. 648, 662. It would, of course, be anomalous to conclude that in enacting the Fourteenth Amendment the

states surrendered their right to enact a state law embracing the Fourteenth Amendment.

Mr. Justice Rehnquist, sitting as a Circuit Justice in *Board of Education of the City of Los Angeles v. Superior Court of California* (1980) 448 U.S. 1343, 65 L.Ed.2d 1166, 1168, 101 S.Ct. 21, recognized the inconsistency of petitioners' argument herein when he quoted from the ruling of Judge Cohn of the Superior Court of San Mateo County, California, in *Tinsley v. Palo Alto Unified School District* (July 10, 1980) No. 206010, as follows:

> " 'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.' "

Conclusion.

Prior to the enactment of Proposition 1, California Constitution Article I, Section 7 read as follows:

> "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

Section 1 of the Fourteenth Amendment to the United States Constitution, in relevant part, provides as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted the above language of the Fourteenth Amendment to require a showing that existing school segregation is the result of

intentionally segregative action on the part of school authorities before a court can order the reassignment of pupils for integration purposes. *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 53 L.Ed.2d 851, 97 S.Ct. 2766.

However, despite the similarity between the above two constitutional provisions, the California Supreme Court has held Article I, Section 7 to require California school districts to integrate regardless of the cause of the segregation that exists. *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 551 P.2d 28.

If the citizens of the State of California do not agree with their Supreme Court's interpretation of their State Constitution, are they powerless to effect a change? Is the act of changing the interpretation of the California Constitution to conform to the interpretation of the almost identical language in the United States Constitution somehow a segregative act?

Certainly the California Supreme Court could have changed its interpretation of the California Constitution to conform to this Court's interpretation of the Fourteenth Amendment if it chose to do so. Surely the people of the State of California, vested with the sole right to amend the California Constitution, have at least an equal right to do likewise.

Proposition 1 only changed the California law with regard to court-ordered mandatory reassignment of pupils to remedy purely *de facto* segregation. The California courts may still order California school districts to take all reasonable and feasible steps, short of mandatory pupil reassignments, to correct school segregation regardless of its cause, and may order the mandatory reassignment of pupils when the United States Constitution requires it. California school

districts may still voluntarily adopt integration plans which involve mandatory pupil reassignments to remedy segregation regardless of its cause. The California rule, therefore, still exceeds the requirements of the Fourteenth Amendment and of the other states. How can a rule exceeding the Fourteenth Amendment and the requirements of the other states possibly be a violation of the Fourteenth Amendment?

For all of the foregoing reasons, it is submitted that the constitutionality of Proposition 1 should be sustained.

Respectfully submitted,

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